No. 82-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MORRIS THIGPEN, ET AL.,

Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., and the MISSISSIPPI PROSECUTORS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent has a substantial double jeopardy claim under the holding in *Illinois* v. *Vitale*, 447 U. S. 410, 65 L. Ed 2d 228, 100 S. Ct. 2260 (1980).

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by William S. Boyd, III, Special Assistant Attorney General, State of Mississippi, attorney for the Petitioners, and Cleve McDowell, Esq., attorney for the Respondent. Letters of Consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national

organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The MISSISSIPPI PROSECUTORS ASSOCIATION is the professional organization representing prosecuting attorneys in the State of Mississippi. By programs of training, publications, legislative and judicial advocacy, it seeks to raise the level of prosecutorial services for the people of that State.

The prosecutors of the various states are vested with the responsibility of representing all the citizens of their respective jurisdictions by charging and prosecuting those who are alleged to have violated the criminal laws. The prosecutor is therefore responsive to the citizenry of his jurisdiction, and the need to promote the safety of all individuals within the context of sound criminal justice principles and the framework of state and federal constitutions.

In this respect, the prosecutor must have the resources and authority to proceed in the charging and prosecution of both homicide offenses and traffic violations. There are no other offenses with a greater threat to life and limb. Our society can only achieve a reasonable level of voluntary compliance with the traffic and criminal laws when the prosecutor diligently exercises his authority to bring violators to justice. Upholding the opinion of the Fifth Circuit in this case threatens our fundamental freedoms just as certainly as do those drunk drivers who daily cause the carnage on our highways to an extent unparalleled in our history.

STATEMENT

Respondent was indicted, tried and convicted of manslaughter by means of culpable negligence in the Circuit Court of Tallahatchie County, Mississippi. He was sentenced to serve twenty (20) years imprisonment.

Respondent's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977, between an automobile driven by Respondent and a pickup truck, in which collision a ten-year-old child was killed. Shortly after the accident, Respondent was cited by a Mississippi Highway Patrolman for driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August 13, 1977, Respondent was tried and convicted on these charges by a Tallahatchie County Justice Court Judge; on the same date, Respondent appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. § 99-35-1. Before the misdemeanor charges were retried on appeal, Respondent was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the Respondent on the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

On or about March 13, 1981, Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Mississippi, which was granted on January 18, 1982, and affirmed by the Court of Appeals for the Fifth Circuit.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit improperly applied a judicial construction to a state statute of homicide and then found this statute to be sufficiently similar to a reckless driving offense to implicate double jeopardy principles. The court misinterpreted the Mississippi case law and should not have applied it to modify the elements of the statute and thereby usurp the legislative function. Further, it was against public policy for the court to construe legislation in a manner that failed to deter abuses of the driving privilege by drunk drivers who cause the death of our citizens by their irresponsible, negligent and criminal behavior.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ERRED IN THAT IT APPLIED A STATE JUDICIAL CONSTRUCTION OF A STATE STATUTE IMPROPERLY, AND TOOK THAT CONSTRUCTION TO BE A STATUTORY ELEMENT, RATHER THAN DISCERNING THAT THE JUDICIAL CONSTRUCTION WAS MERELY THE APPLICATION OF PARTICULAR FACTS TO A HOMICIDE STATUTE. THE COURT THEREBY ATTEMPTED TO CREATE THE OFFENSE OF "MANSLAUGHTER BY AUTOMOBILE", WHICH IS A USURPATION OF THE LEGISLATIVE FUNCTION. WITHOUT SUCH IMPROPER USURPATION, NO DOUBLE JEOPARDY CLAIM WOULD EXIST IN THIS CASE.

The United States District Court for the Northern District of Mississippi, and the United States Court of Appeals for the Fifth Circuit, in their opinions in the instant case, make repeated reference to the Mississippi offenses of "manslaughter by automobile," "vehicular homicide," and "manslaughter with a motor vehicle." The State of Mississippi quite simply has no such statutory offenses.

The homicide offense with which the Respondent was charged is Miss. Code Ann. § 97-3-47. This offense is captioned: "Homicide—all other killings." The statute provides that "[e]very other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law provided for in this title, shall be manslaughter." The caption and language of this offense clearly offer every indicia that the legislature has chosen not to adopt an offense of homicide with a motor vehicle.

The lower courts cite *Smith* v. *State*, 20 So. 2d 701 (Miss. 1945), as the authority for establishing the offense of "manslaughter by automobile" when that court stated, "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence which must be wanton or reckless under circumstances implying danger to human life." *Id.* at 704. A review of the *Smith* case rebuts the lower courts' interpretation on at least two accounts. First, the case in no manner holds or stands for the proposition that there is a statute of manslaughter by automobile in the State of Mississippi. The quote in question is nothing but dictum used to amplify the issue that culpable negligence is not equivalent to gross negligence. The quoted phrase could have made the same point by stating, "The gist of the offense of manslaughter, where factually a motor vehicle was the instrumentality causing the death, is criminal negligence . . ." *Amici* question whether the Fifth Circuit could have reached the same conclusion had the language varied to this slight degree.

The findings of the lower courts are even more questionable in light of other language in *Smith* which clarifies the distinction between mere traffic violations and manslaughter in terms of conduct, and thus goes to the central issue of the instant case. The court in *Smith* stated at 704:

> In the *Cutshall* case, the court also said that "driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49. ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams* v. *State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter . . . Although a jury may find the conduct of the operator constitutes gross negligence, the violation of the statute is not culpable negligence per se within the definition of Section 1002 (which is the same as Section 2232, Code of 1942, here involved)" The same may be said in regard to the act of the defendant when he "carelessly and negligently . . . drove his car from the west side . . . to the east side of the road."

It is submitted that when read in its entirety, the *Smith* decision does not establish an offense of manslaughter by motor vehicle, but it does draw distinctions between the culpable negligence required to be shown in a manslaughter prosecution, and the negligence necessary for a simple traffic case. This case rebuts, rather than advances, the notion that manslaughter wherein an automobile was the instrumentality of death cannot be proven without at the same time proving reckless driving.

Assuming, *arguendo*, that Mississippi case law had adopted the term "manslaughter by motor vehicle," the federal courts then placed themselves in what the Fifth Circuit called a "novel situation." The novelty is that these courts treat the judicial interpretation of the homicide offense as, in effect, quasi-legislative alterations of the language of the statute.

The Fifth Circuit strongly indicates that if its considerations were undertaken on the basis of the manslaughter statute without the case law veneer, its conclusion would have been different. At footnote 6, the court states:

> In prior cases the two offenses in question have been specifically defined by distinct statutes. For example in *Illinois* v. *Vitale*, both the traffic offense of failure to reduce speed and the felony offense of involuntary manslaughter by motor vehicle were statutory . . . In *Brown* v. *Ohio*, two specific statutes were involved, joyriding and auto theft.

The court then makes the circular argument that this need not be considered because under the second prong of the analysis in *Illinois* v. *Vitale*, 447 U. S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 (1980), the prosecution had to establish reckless driving in proving manslaughter. But such can only be true if the manslaughter statute is construed to include the court's interpretation of the Mississippi case law. We submit that the court made an improper determination of the case law. However, a far more fundamental issue is that the Fifth Circuit interprets the statute as if it has been amended by the state courts, which would be an unquestionable judicial usurpation of the legislative function.

For the purpose of determining double jeopardy, the courts must look at the *statutory* elements of the charges. *See, Illinois* v. *Zegart, cert. den.*, 452 U. S. 948, 951 (1981) (Rehnquist J., dissenting). To add to or subtract from those elements based upon judicial interpretation violates the fundamental roles of the respective branches of government.

The Mississippi Constitution, at Article 1, Section 1, provides:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

That constitutional provision has been interpreted by the Mississippi courts to mean that the courts cannot substantially change a statute. *Yerger* v. *State*, 91 M. 802, 45 So. 849; *Hamner* v. *Yazoo Delta Lumber Co.*, 100 M. 349, 56 So. 466; *State* v. *Traylor*, 100 M. 544, 56 So. 521.

Further, Article 4, Section 33 of the Mississippi Constitution provides, "The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives."

While many state legislatures have enacted laws which relate specifically to homicides resulting from the operation of motor vehicles, Mississippi's legislature has not done so. We do not believe that the Mississippi courts have accomplished what would undoubtedly be an encroachment and usurpation of the legislative authority in violation of the state's Constitution, and it was manifestly improper for the federal courts in this case to reach such conclusion.

II.

IT IS AGAINST PUBLIC POLICY TO CONSTRUE STATE STATUTES IN A MANNER RESULTING IN A FINDING OF DOUBLE JEOPARDY WHERE THE RESPONDENT WAS FOUND TO HAVE BEEN DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRIVING ON THE WRONG SIDE OF THE ROAD, DRIVING WITH A SUSPENDED LICENSE AND RECKLESS DRIVING, RESULTING IN THE DEATH OF A 10 YEAR OLD CHILD.

The traffic laws of each state are like all other laws in that they are designed to provide for the welfare of the populace. However, they are also distinct from other laws because they govern the use of an instrumentality which provides great benefit when operated properly, and fatal detriment when operated improperly. Traffic laws have been successful by providing order to a technology which has permitted the greatest measure of mobility in the history of mankind. At the same time, traffic laws, both in their enactment and administration, have been hindered in their efforts to safeguard society from those who abuse the driving privilege.

All those involved in traffic law administration and enforcement must share this responsibility—the state legislatures as they enact traffic laws, the courts as they apply those laws, and the executive branch as it administers the driving privilege. Each branch of government must be responsive to the public's concerns.

Our traffic laws are like all other laws in that they depend to some extent upon the deterrent effect of sanctions to secure compliance. Each driver must know that the consequences of violating these laws will exceed the benefits derived from such actions. It is not a question of knowing right and wrong, but rather weighing the benefits against the consequences when a driver decides to exceed the speed limit, fails to yield the right-

of-way, or violates other traffic laws. If those involved in traffic law enforcement, prosecution and sentencing can impress upon drivers that the risks are substantial, more drivers will make the rational decision of abiding by traffic laws and regulations.

It is a fundamental concept of deterrence that when sanctions are severe, the risk need not be as certain to achieve a higher degree of voluntary compliance. While the vastness of our roadways combines with the limitations of our enforcement resources to preclude the certainty of sanctions issuing against all traffic violators, the severity of punishment is an alternative to which we must resort for life-threatening circumstances such as that found in cases of drunk driving.

Recent years have shown a growing public concern for the need to deal with the drunken driver in the harshest manner possible. The emergence of grass roots organizations marshalling public awareness of this problem of the drunken driver is not only indicative of this concern, but also a reflection of the need for police, prosecutors and judges to respond to efforts to remove these drivers from our roads.

Amici note that the U. S. Supreme Court has been a leading force in promoting highway safety generally and in deterring drunken drivers specifically. We will not repeat here the statistical data which sadly catalogues the appalling loss of life, crippling effect and economic loss involved in this problem. The Court itself has reviewed this information in recent decisions on this topic. We ask only that the Court be mindful of statements from recent cases such as *South Dakota* v. *Neville*, ___ U. S. ___, 74 L. Ed 2d 748, 103 S. Ct. 916, 920 (1983):

> The situtation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the

problem that the state courts have has repeatedly lamented the tragedy. See *Breithaupt* v. *Abrams,* 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate* v. *Short,* 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1970) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez* v. *Campbell,* 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed2d 233 (1971) (Blackman, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey* v. *Montrym,* 443 U.S. 1, 17-18, 99 S.Ct. 2612, 2620, 2621, 61 L.E.2d 321 (1979) (recognizing the "compelling interest in highway safety").

See also, Illinois v. *Batchelder,* ____ U. S. ____, ____ L. Ed 2d ____, 103 S. Ct. ____, 33 Cr L 4106 (1983).

To uphold the decision of the Fifth Circuit Court of Appeals in the instant case, where the driver had a suspended license, was under the influence of alcohol, crossed the center line, struck another car and caused the death of a 10 year old child, would be a brutal affront to all those who have suffered from such irresponsible behavior as well as those citizens who daily fear that they may be an innocent victim of this intolerable abuse of the driving privilege.

CONCLUSION

Amici submit that the finding of double jeopardy in this case is based on misconstrued and improperly applied case law to the statutory elements of the specific offense and such is a usurpation of legislative authority which when applied to the facts of this case is also an affront to public policy to rid our roads of drunk drivers. We respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit be reversed on the facts, the law, and sound judicial policy.

Respectfully submitted,

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